AN EDUCATIONAL UPDATE FROM
THE SOUTHEAST LAW INSTITUTE™, INC.

To: **SLI Supporters**
Date: **February 2015**
From: **A. Eric Johnston**
Re: **Traditional Marriage Declared Unconstitutional in Alabama**

Several cases were filed in Alabama federal courts contesting the Alabama Sanctity of Marriage Amendment, Article I, § 36.03, 1901 *Constitution of Alabama* and a similar statute, The Alabama Marriage Protection Act, § 30-1-19, 1975 *Code of Alabama*. Both of these laws permit only traditional marriage between a man and a woman.

One of those cases was filed in the United States District Court for the Southern District of Alabama, that is, Mobile, Alabama. It is the case of *Searcy and McKeand v. Luther Strange, Attorney General*. Its basis was that an Alabama lesbian same sex couple were married in California and Searcy wanted to adopt McKeand's eight year old biological son. This was prohibited because Alabama's Spousal Adoption Statute would permit only adoption by an opposite sex spouse, in light of the marriage amendment and statute. On January 23, 2015, the trial judge found Alabama's marriage amendment and statute unconstitutional.[1] Presumably the adoption could not be prohibited.

The judge based her reasoning on the several recent cases in other states and circuits finding similar marriage laws unconstitutional. Rather than analyze Alabama's law in light of Alabama's public policy legal history, she said, "This court has the benefit of reviewing decisions of all these other courts." With almost no analysis, the judge found the plaintiffs' due process and equal protection rights violated.

The judge found the right to marry is a fundamental right. Without a compelling interest achieved through the most narrow requirement, any law that burdens such a right would be unconstitutional. She found Alabama's law burdens that right for same sex persons. The only thing the trial court explained in any detail, and then only a page or so, is that the law "humiliates [ ] thousands of children now being raised by same sex couples." She held, "Alabama's prohibition of same-sex marriage detracts from its goal of promoting optimal environments for children." This "denies the families of these children a panoply of benefits that the state and the federal government offer to families who are legally wed . . .", presumably being the right to adopt a spouse's child, the issue in this case.

There are several interesting features about this case which significantly detract from its scholarship, legitimacy, and intent. Only in a footnote did the court find not compelling the state's arguments of states' rights, our history and tradition of opposite-sex marriage, protecting the institution of marriage, encouraging possible procreation, *etcetera*. There was no discussion of these issues. These reasons are among Alabama's most important. Our history and tradition of laws originating in the common law of England established marriage between a man and a woman, with sodomy always being a crime, not ever recognized as being legal in any culture. As one of the pillars of our culture, the family, along with the state and the church, insure our freedoms and future. By basing marriage, the most important aspect of the family, on mere sexual preference, the judge ignored the meaning of family.

Another disappointing feature of this court opinion is that it was based on "summary judgment." A summary judgment is made on the basis when there is only an argument of law, and no dispute of material fact. No evidence is taken, though affidavits may be filed. By dealing with the children in same sex household issue, this court enters into one of the most important aspects of the marriage debate, yet makes a decision that same sex households are as good as heterosexual households. This is without the benefit of evidence, expert testimony, cross examination, and other legal practice and procedures necessary to a properly founded court judgment.

In another footnote, the court recognizes the U.S. Supreme Court has granted review of the Sixth Circuit Court of Appeals' opinions that traditional marriage is lawful. She says, "The questions raised in this lawsuit will thus be definitely decided by the end of the current Supreme Court term, regardless of today's holding by this court." By late June 2015, the U.S. Supreme Court will rule on the marriage question. Why did this trial court judge take it upon herself to interfere with Alabama's strongly held public policy in effect since 1819? Additionally, her order was released at the end of the day on Friday, January 23, 2015, leaving the state, probate judges, and others in turmoil as what would happen on the following Monday morning. At this point, nothing has happened. Actually, only Luther Strange is a party to the lawsuit and the finding of unconstitutionality of Alabama's marriage laws does not require probate judges to issue marriage licenses or ministers to perform weddings for same sex persons. Finally, in her haste, she forgot to explain the impact of her ruling on the practical issue in the case: Can the lesbian spouse adopt?

While the initial order was not stayed, it subsequently was stayed temporarily. Things will be held in abeyance for an appeal by the state for review by the Eleventh Circuit Court of Appeals. Hopefully, this judge will not decide to discontinue the stay at any point. This preemptive strike at Alabama's marriage laws is without justification or necessity. With the Supreme Court addressing the issue, there was absolutely no need for the ruling. The decisions of federal courts around the country are disappointing in their paucity of support in legal and factual history for upending America's traditional marriage laws. This court's ruling is the worst example of this activism.

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[1] On January 27, 2015, the same judge relying on her ruling in *Searcy* held in another case, *Strawser & Humphrey v. Strange*, that two men could be married. The basis was the ludicrous finding a hospital would not honor a power of attorney from one man for the other unless they were married. Alabama law already permits this and provides a cause of action to enforce it.